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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 313

L. B. DINION, *Petitioner*,

vs.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1957.

No.

L. B. BINION, *Petitioner*,

vs.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS.

L. B. BINION, your petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above entitled case on June 28, 1957.

OPINION OF THE COURT BELOW.

The opinion of the court below (Appendix A, infra, pp. 15) has not yet been reported.

JURISDICTION.

The judgment of the court below (Appendix B, infra, p. 16) was entered on June 28, 1957. The jurisdiction of this court is invoked under 28 U. S. C. §1254(1).

QUESTIONS PRESENTED.

The principal question is whether the sentence, though authorized by §145(b) is unlawful because it was not imposed under §3616(a) of the Code.

This court decided in *Achilli v. United States*, 353 U. S. 373, that §3616(a) did not apply to evasion of the income tax. Petitioner submits with deference that this is incorrect, and in view of the recentness of the *Achilli* decision, submits reasons that §3616(a) was not repealed by implication.[1]

STATUTES INVOLVED.

Internal Revenue Code of 1939:

§145. *Penalties.*

* * * * * * *

(b) Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax:—

Any person required under this chapter to collect, account for, and pay over any tax imposed by this

---

[1] In the event that certiorari is granted, petitioner reserves the right to argue that the overlap between §145(b) and 3616(a) precludes the imposition of a sentence under §145(b).

chapter, who wilfully fails to collect or truthfully account for and pay over such tax, and any person who wilfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * * * *

(26 U. S. C., 1952 ed., Sec. 145 (b).)

Sec. 3616. Penalties.

Whenever any person—

(a) False returns. Delivers or discloses to the collector or deputy any false or fraudulent list, return, account, or statement, with intent to defeat or evade the valuation, enumeration, or assessment intended to be made; * * * he shall be fined not exceeding $1,000, or be imprisoned not exceeding one year, or both, at the discretion of the court, with costs of prosecution.

* * * * * * *

STATEMENT.

On September 5, 1953, the petitioner pleaded guilty to two indictments charging that he did wilfully and knowingly attempt to defeat and evade income taxes due to the United States of America by filing and causing to be filed false and fraudulent income tax returns with the Collector of Internal Revenue at Dallas, Texas (R. 3, 6, 7, 97, 100-104).

On December 14, 1953, the petitioner was sentenced by the Court on the first count of Indictment No. 3766 to a term of imprisonment for a period of five years and to pay a fine in the sum of $5000.00, and under the second count of this indictment to a term of imprisonment for five years to run

concurrently with the first count and a fine in the sum of $5000.00 (R. 3, 93-94). The petitioner was sentenced on the fifth count of indictment No. 3767 to a term of imprisonment for a period of five years to run concurrently with that imposed on the first count of Indictment No. 3766 and to pay a fine in the sum of $5000.00, and on the sixth count of the indictment to pay a fine in the sum of $5000.00 and to a term of imprisonment for a period of five years, the execution of this sentence of imprisonment to be suspended provided that the fines totaling $20,000.00 be paid within 90 days. The Court dismissed the first, second, third and fourth counts of this indictment (R. 97, 136-140).

The petitioner has served a period of imprisonment from December 14, 1953, has paid the fines imposed, and has accrued credit for time served for good behavior while imprisoned in the United States Penitentiary at Leavenworth, Kansas (R. 145).

On September 22, 1956, a motion to correct the sentences was filed alleging that petitioner's sentences of imprisonment are excessive and illegal and that they exceed the maximum sentences of imprisonment authorized by law (R. 97, 143-145). Petitioner averred that his sentences of imprisonment should have been imposed for misdemeanors under §3616(a) of the Internal Revenue Code of 1939 rather than under §145(b) of the Internal Revenue Code (R. 144).

On September 28, 1956, the trial Court ordered that the motion of the petitioner to correct and set aside the sentences be denied (R. 146). On October 4, 1956, an appeal from this order to the Court of Appeals was taken.

On June 28, 1957, the Court of Appeals affirmed the judgment on the authority of *Achilli v. United States* and *Costello v. United States*.

REASONS FOR GRANTING THE WRIT.

This case presents, in its present posture, the sole question whether the recent decision of *Achilli v. United States* was, it is submitted, correctly decided. Petitioner submits, with deference, that it was not, and that great mischief will follow unless this decision is overruled.

1. For three successive Terms it was the Government's position that §3616(a) of the Internal Revenue Code of 1939 was applicable to income tax returns, and that there was accordingly an area of overlap between that section and §145(b) of the same Internal Revenue Code. See Br. Op. 7-11 in *Dillon v. United States*, No. 629, Oct. T. 1954, certiorari granted, 349 U. S. 914, and dismissed and remanded, 350 U. S. 906; U. S. Br. 10-11, 22-24, in *Berra v. United States*, No. 60, Oct. T. 1955, 351 U. S. 131; U. S. Memo., p. 2, in *Costello v. United States*, No. 666, Oct. T. 1956, while pending on the merits after grant of certiorari, 352 U. S. 988.

The government then executed a complete about-face and stated that §3616(a) was inapplicable to income tax returns. This court, in the *Achilli* case, declared:

> "And so, now, for the first time has the Government made a detailed survey of the problem of alleged overlapping between §3616(a) and §145(b)."

But this court should not take its law from the government, and it is submitted that the analysis supplied by the government to the Court and adopted by this court is not correct for the following reasons:

Section 3616(a) of the Internal Revenue Code of 1939 was derived from R. S. §3179. See Appendix A to IRC of 1939, "Derivation of Internal Revenue Code," 53 Stat. App. p. xxxii, s. v. §3616; Appendix B to id., "Statutes included in Internal Revenue Code," 53 Stat. App. p. xl, s. v. R. S. §3179. This derivation seems not to be in dispute.

In turn, R. S. §3179 was derived from Sec. 15 of the Act of June 30, 1864, 13 Stat. 223, 227. See side note to R. S. §3179 in the 1874 edition of the R. S., p. 614; id. in the 1878 edition, p. 611.

The Act of June 30, 1864, supra, imposed an income tax in its §§116-123, 13 Stat. at 281-285. Plainly, then, §15 of the 1864 Act applied to false or fraudulent income tax returns when first enacted. This, again, is not in dispute. From that premise it necessarily follows that §3616(a) still applies to the false or fraudulent income tax returns, for the reason that the meaning of a statute does not change simply because it passes through one or more revisions without changes in its substantive language. E. g., *Nye v. United States*, 313 U. S. 33; *Logan v. United States*, 144 U. S. 263, 302, and cases there cited.

§3179 of the Revised Statutes was never repealed, either expressly or by implication, but on the contrary was specifically re-enacted.

The Government admitted that the applicability of R. S. §3179 to income tax returns survived the repeal of the Civil War income tax and remained in force so as to govern returns filed pursuant to the income tax imposed by the Act of 1894. But it argued that in 1909 "Congress for the first time enacted a specific penal provision applicable to the income tax," and, since that latter provision involved the same penalties as R. S. §3179, that "in relation to the income tax the general provision of §3179 was superseded pro tanto by the specific provision in the 1909 act."

The fallacy of the foregoing argument lies in its premise, for as a matter of law the 1909 Act did not levy an income tax. In the period between the decision of this Court that held the 1894 income tax unconstitutional (*Pollock v. Farmers' Loan & T. Co.*, 157 U. S. 429, 158 U. S. 601), and the effective date of the Sixteenth Amendment, Congress could not and did not attempt to levy any income tax. Accordingly what was involved in the 1909 Act was an excise tax on corporation measured by income, and not an income tax. See *Flint v. Stone-Tracy Co.*, 220 U. S. 107, which sus-

tained the constitutionality of the corporate excise tax imposed by the 1909 Act. Moreover, the penalty provision of the 1909 Act (Sec. 38 (Eighth), 36 Stat. at 117) applied in terms only to the filing of a false or fraudulent return with intent to defeat or evade "the assessment required by this section to be made". It was not general legislation.

The first true income tax law subsequent to 1894 was the Act of Oct. 3, 1913, c. 16, 38 Stat. 114. The *penalty* provision thereof, §II(F), 38 Stat. at 171, with its maximum of a year's imprisonment and a $2000 fine, was greater than the penalty imposed by R. S. §3179. The mere increase in penalty was regarded by this court as impliedly repealing R. S. §3179. But the principle appropriately invoked is the rule that, where two penalties cover the same offense, the lesser necessarily governs. *Prince v. United States*, 352 U. S. 322; *Bell v. United States*, 349 U. S. 81, 83; *United States v. Universal C. I. T. Corp.*, 344 U. S. 218, 221-222; *Fong Haw Tan v. Phelan*, 333 U. S. 6, 10. However, it is not necessary to resolve this question; since §11(F) by its terms was restricted to "the assessment required by this section to be made", it plainly cannot be construed to have effected a permanent repeal of R. S. §3179 with respect to the latter's applicability to all income tax returns in the future.

The penalty prescribed by §18 of the Revenue Act of 1916 (Act of Sept. 8, 1916, c. 463, 39 Stat. 756, 775; later expressly amended, in particulars not here material, by §1209 of the Revenue Act of 1917, c. 63, 40 Stat. 300, 336) was the same as that set forth in §11(F) of the 1913 Act. Again, the 1916 penalty was limited to a false return affecting "the assessment required by this title to be made". The transitory aspect of the 1913 penalty provision was emphasized by its repeal, except in respect of taxes already accrued, by §24 of the 1916 Act (39 Stat. at 776). And other provisions of the 1916 Act negative any notion that Congress ever supposed that it was repealing or permanently amending R. S. §3179.

Sec. 16 of the 1916 Act, 39 Stat. at 773-775, expressly amended R. S. §§3167, 3172, 3173, and 3176. Plainly, then,

Congress was confronted with possible inconsistencies between the provisions of the Revised Statutes relating to internal revenue, and those of the new act, and took appropriate steps to weld all of them into a coherent and consistent body of law. The circumstances that, after amending the enumerated sections of the Revised Statutes, R. S. §3179 was left intact, unamended and unrepealed, *is surely eloquent evidence that Congress intended that latter provision to stand.*

We come now to the Revenue Act of 1917, which, according to the Court, is "further evidence that Congress withdrew the income tax from the reach of the general provisions of §3179". But, *on the contrary*, what the 1917 Act did was two-fold. First, it removed the inconsistency between R. S. §3179 and the particular income tax act with respect to the penalty for making a false return, by making the penalties under each identical; and, second, *it added the new offense of evading or attempting to evade the tax.*

It seems fairly clear, therefore, that Congress in the 1917 Act distinguished between the simple making of a false return, on the one hand, and the evasion or attempted evasion of the tax in any other manner, on the other.

Section 1004 of the 1917 Act distinguished between the two offenses of (a) filing a false, etc., return, and (b) attempting to evade the tax. The 1917 Act denounced both offenses in a single section and prescribed the identical penalty for each. The 1918 Act, on the other hand, denounced (b) in its §253, with a maximum fine of $10,000, and relegated the punishment of (a) to the provisions of R. S. §3179. This construction, which avoids both inconsistency as well as any discussion of implied repeal, is fortified by the circumstances that, in §1317 of the 1918 Act, 40 Stat. at 1146-1148, Congress expressly amended R. S. §§3164, 3165, 3167, 3172, 3173, and 3176. It neither amended nor repealed R. S. 3179, but on the contrary, made all existing administrative provisions of the internal revenue laws applicable to the income tax imposed by the 1918 Act. Sec. 1305, 40 Stat. at 1142.

It therefore necessarily follows that, with respect to punishing the simple filing of false returns, Congress intended to rely on R. S. §3179, and that it is the latter intention which explains the fact that from 1918 through 1938 none of the revenue acts prohibited in terms the filing of false or fraudulent returns. And the reason for that omission is plain. The mere filing of false or fraudulent income tax returns did not need to be specifically prohibited in successive revenue acts, since such offenses were amply covered by the *permanent* provisions of R. S. §3179.

In 1939, Congress enacted the Internal Revenue Code, in order, as the title of the Act indicates, "To consolidate and codify the internal revenue laws of the United States."

And what did Congress do when confronted with that opportunity? It re-enacted R. S. §3179 as §3616(a) of the 1939 Internal Revenue Code, and it specifically provided in §61 of the Code that all administrative provisions should be applicable to income taxes.

Section 3616(a) was a part of Subchapter B, Determination of Tax Liability, which in turn was a part of Chapter 34, Information and Returns, which in its turn was a part of Subtitle D of the Code, entitled General Administrative Provisions. While, of course, Congress stated in §6 of the Act of Feb. 10, 1939 (53 Stat. 1a) that no inference of legislative construction should be drawn by reason of the location of any particular section, cf. *United States v. Dixon*, 347 U. S. 381, Section 61 of the Code would be meaningless if it were not possible to consider as administrative provisions sections which were not only so labeled, but which were plainly administrative in substance.

When it came to the Internal Revenue Act of 1954, 26 U. S. C. A., Congress re-enacted §3616(a) as §7207, eliminating the words "with intent to defeat or evade", which had caused the overlap with §145(b). The fact that Congress acted in 1954 to remove the overlap, proves conclusively that §3616(a) was never repealed before 1954.

2. Mr. Justice Frankfurter stated in *Achilli v. United States*:

> "We cannot hold that the classic method of evading the income tax, the filing of a false return, did not constitute an attempt 'in any manner to defeat or evade' that tax."

It is submitted that filing is not the classic method of evading the income tax, but merely the classic method of *charging* an evasion of income tax, and that there has always been a distinction made by Congress between "filing" and "attempting".

In *Spies v. United States*, 317 U. S. 492, it was squarely held that the difference between the misdemeanor denounced by §145(a), of wilfully failing to pay taxes due, and the felony of wilfully attempting to evade and defeat the tax, made criminal by §145(b), was that in the latter situation there must be proof of a wilful affirmative act. Mr. Justice Jackson, speaking for a unanimous Court, said (317 U. S. at 499):

> "By way of illustration, and not by way of limitation, we would think affirmative wilful attempt may be inferred from conduct such as keeping a double set of books, making false entries or alterations, or false invoices of documents, destruction of books or records, concealment of assets or covering up sources of income, handling of one's affairs to avoid making the records usual in transactions of the kind, and conduct, the likely effect of which would be to mislead or to conceal. If the tax-evasion motive plays any part in such conduct the offense may be made out even though the conduct may also serve other purposes such as concealment of other crime."

Petitioner's conviction of the felony in that case was reversed because of the failure there of the trial judge properly to instruct the jury as to the difference between Sections 145(a) and 145(b).

The distinction defined in the *Spies* case was reaffirmed in another decision at the same Term, *United States v. Johnson*, 319 U. S. 503, where it was again pointed out that the filing of a false return might only be a misdemeanor. Mr. Justice Frankfurter, for the Court, said (319 U. S. at 514-515):

> "* * * the Circuit Court of Appeals read the substantive counts as though they charged Johnson *merely with the filing of false returns on March 15th. That may only be a misdemeanor* under §145(a) of the Internal Revenue Code, but that is not the offense with which Johnson was charged. He was charged with a felony made so by §145(b), the much more comprehensive violation of attempting 'in any manner to defeat and evade' the payment of an income tax. The false return filed on March 15th was only one aspect of what was a process of tax evasion." (Emphasis supplied.)

There, however, since the petitioner had conducted "an elaborately concealed illegal business" (319 U. S. at 517-518), the reversal of his conviction was in turn reversed.

If Congress had intended that mere filing a false income tax return be punished the same as attempting in any manner to defeat and evade the payment of an income tax, it surely would not have been necessary for this Court to catalogue the various methods by which a wilful attempt could be inferred. It is true that the various Courts of Appeals have indicated that mere filing of a return known to be false was regarded as an attempt, but the conviction in those cases did not merely rest alone upon the *allegation and proof of a wilful filing of a false return;* there was always proof of other affirmative acts in the record, *Kirsch v. United States*, 174 F. 2d 595 (C. A. 8).

In *United States v. Demos*, 291 Fed. 104 (S. D. Fla. 1923), the Court there expressed doubt whether Congress ever intended that the offense of evading and defeating an income tax established in an Internal Revenue Act should cover the

making of a false and fraudulent return, since that act was already punished under a prior statute.

At any rate, the cases are clear that filing a false and fraudulent return is not "the major kind of attempt", as stated by this Court. E. g., *Cave v. United States*, 159 F. 2d 464 (C. C. A. 8), certiorari denied, 331 U. S. 847 (defendant kept no books); *United States v. Lange*, 161 F. 2d 698 (C. C. A. 7) (elaborate system of payroll padding, fictitious purchases, suppressed sales, false invoices, altered records); *Locke v. United States*, 166 F. 2d 449 (C. C. A. 5), certiorari denied, 334 U. S. 837 (defendant "resorted to various ingenious and nefarious scheme and subterfuges"); *United States v. Chapman*, 168 F. 2d 997 (C. C. A. 7), certiorari denied, 335 U. S. 853 (defendant's mode of carrying on his business operations was calculated to conceal their magnitude and prevent investigation thereof); *Myres v. United States*, 174 F. 2d 329 (C. A. 8), certiorari denied, 338 U. S. 849 (defendant kept no books, records, cancelled checks or check stubs, and destroyed numerous files).

3. No reference is made in the *Achilli* opinion to *Berra v. United States*, 351 U. S. 131 (1956), where this Court assumed that filing a false and fraudulent tax return was a misdemeanor under §3616(a). Indeed, the Report of the Committee on Procedure in Fraud Cases of the American Bar Association in 1957 stated: "The Supreme Court held that although both sections applied to income taxes and could, in particular sections cover an identical offense, the choice between them was not a matter for the jury." We have, apparently, two conflicting decisions of this Court as to whether §3616(a) applies to income taxes.

The government, on page 15 of its brief, fn. 3, in the *Achilli* case, stated:

> "Since the Revenue Act of 1924, §145(b) has been the basis for prosecution in literally thousands of criminal income tax evasion cases, as appears, *infra*, pp. 32-33, its applicability to such cases has been sustained by

this Court and by the Courts of Appeals in a host of decisions extending over a period of three decades. A ruling now that the sentences involved in all these cases are illegal if they exceed the limits permitted by §3616(a) would create legal and practical difficulties of an obviously grave nature."

It is submitted that far greater legal and practical difficulties are created by the Court's decision in the *Achilli* case. The government has stated that they have invoked §3616(a) in 175 cases of alleged income tax evasion. It never did state how many cases of §145(b) *exceeded* the limits permitted by §3616(a), probably because there were less; and petitioner suggests that although it may have been the basis for prosecution in "literally thousands of income tax evasion cases", that at the present time there are more defendants who will be released as a result of this decision than if §3616(a) were held to apply to income tax cases where the charge is merely the filing of a false and fraudulent return. Furthermore, as a result of this Court's decision, taxpayers whose cases are of a minor nature, which the government had previously prosecuted under §3616(a) can now only be prosecuted under §145(b) and are liable to the maximum penalties under that statute.

4. The philosophy of repeal by implication is not favored, and surely has no place where the section sought to be repealed was itself enacted subsequent to the repealing section. Section 3616(a) obviously was enacted later than §145(b). Especially where the same subject matter has been covered by both a general and special statute, the terms of the latter always prevail. *Washington v. Miller*, 235 U. S. 422 (1914). Clearly the specific charge of filing a false return prevails over the general denunciation of attempting to evade taxes prescribed by §145(b), where the filing of a false return is only one of the "attempts in any manner", and then not as a matter of specific statutory pro-

hibition but by judicial interpretation. It is submitted that the death of §3616(a) under the circumstances of this case is "not within the judicial competence".

CONCLUSION.

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

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July, 1957.

APPENDIX A.

IN THE
UNITED STATES COURT OF APPEALS.
FOR THE FIFTH CIRCUIT.

No. 16335.

L. B. BINION,
Appellant,
versus
UNITED STATES OF AMERICA,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS.

(June 28, 1957.)

Before RIVES, TUTTLE and JONES, Circuit Judges.

PER CURIAM: On the authority of *Achilli v. United States of America*, United States Supreme Court Nos. 430 and 834, October Term, 1956, decided May 27, 1957, and *Costello v. United States of America*, United States Supreme Court No. 666, October Term, 1956, decided June 3, 1957, the judgment is

AFFIRMED.

APPENDIX B.

IN THE

UNITED STATES COURT OF APPEALS.

FOR THE FIFTH CIRCUIT.

L. B. BINION,
Appellant,

versus

UNITED STATES OF AMERICA,
Appellee.

JUDGMENT.

On consideration whereof, it is now Ordered and Adjudged by this Court that the judgment of the said District Court be affirmed.

June 28, 1957.

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Supreme Court of the United States

OCTOBER TERM, 1957.

No. 313

L. B. BENIOR, *Petitioner*,

vs.

UNITED STATES OF AMERICA.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITIONER'S REPLY MEMORANDUM

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vs.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITIONER'S REPLY MEMORANDUM

Petitioner agrees with the government's contention that the instant case is presently governed by *Achilli* v. *United States*, 353 U.S. 373 (1957)—but respectfully submits that the *Achilli* decision was wrong and in conflict with an opinion of this Court rendered last year, *Berra* v. *United States*, 351 U.S. 131, as well as with prior judicial decisions by this Court and

limits the application of an Internal Revenue Statute to so narrow a scope as to make it inefficacious.

The genesis of §3616(a) has already been rather fully discussed in the petition for writ of certiorari; however, it is suggested that the *Achilli* decision is based on several inconsistencies and inaccurate premises not heretofore brought to the Court's attention.

1. This Court stated that as long ago as 1926 it had been the government's position that the predecessor of §145(b) effectively repealed §3616(a)'s applicability to income tax evasion, citing brief for the United States, pages 16 to 19, in *United States* v. *Norcek*, 273 U.S. 202 (1927). However, it should be noted that the issue before the Court in the *Norcek* case did not concern R.S. §3179 (the predecessor of §3616(a)). In that case, defendant was charged with and convicted of perjury in making returns for the purpose of taxation under §125 of the criminal code. He defended on the grounds that §125 had been repealed so far as concerns perjury on tax returns by §253 of the Revenue Act of 1918 (re-enacted as §253 of the Revenue Act of 1921), which made it an offense to attempt wilfully in any manner to defeat or evade a tax. (This section is a forerunner of §145(b)). In effect, the defendant's argument in the *Norcek* case was identical with the government's argument accepted by the majority of the Court in the *Achilli* decision. The government, in its brief, traced the derivation of §253; it contended that even if the Revenue Acts of 1916, 1917, 1918, 1921, 1924 and 1926, by making more particular provision against false returns than R.S. §3179, repealed that section *pro tanto*, that they effected no further repeal, and that they did not repeal §125.

The government, in the *Noyeck* brief (1926), conceded that, "§ 15 of the Act of June 3, 1864 (Filing False Returns) was carried into the revised statutes as § 3179. It is still in force as noted by the editors of Compiled Statutes (6 Comp. Stat., Sec. 5901) and Federal Statutes Annotated (3 Fed. Stat. Ann. 2d Ed., p. 1009)". (Page 14) Noyeck, the defendant, argued that since perjury amounted to an attempt to defeat or evade the tax there was also a repeal, *pro tanto*, by "§ 253", arguing that since § 253 provided that whoever defeats or evades "in any manner" is guilty, Congress intended to embrace within the provisions of § 253 of the Revenue Act *all methods* of defeating or evading the income tax. But this reasoning was rejected. Justice Brandeis, speaking for the Court, held that the offenses of perjury and of attempting to evade income taxes by filing false statements are not identical, even when they arise out of the same transaction or act. "Each involves an element not found in the other." *United States* v. *Noyeck*, *supra*, at 296. Justice Brandeis did not specifically mention R.S. § 3179, although he *rejected* the idea that § 125 had been repealed *pro tanto* by § 253, concluding, "There is nothing in the history of the revenue legislation which should lead us to a different conclusion."[6] It is obvious that Justice Brandeis would have similarly rejected the government's contention that § 253 had repealed *pro tanto* R.S. § 3179.

[6] In *Sandberg* v. *McDonald*, 248 U.S. 185, 201 (1918), Justice McKenna, who joined by Holmes, Brandeis and Clarke, wrote a dissent, stated that the Court was not "called upon to assign the genesis of the policy or trace the evolution of its remedy. . . ." "Ours is the simple service of interpretation and there is no reason to hesitate in its exercise because of supposed consequences."

Regardless of the government's position in 1926, the *Achilli* decision neglects to consider less remote history—the *Berra* case—in which the defendant contended, the government conceded,[2] and Justice Harlan assumed *arguendo* that § 3616(a) is applicable to income tax returns. *Berra* v. *United States*, *supra*, at 133. Furthermore, the *Achilli* decision recognizes that during the last five years the government has prosecuted a great many taxpayers under § 3616(a), but explains that the government for the first time has made a detailed survey of the problem of alleged overlapping between § 3616(a) and § 145(b). If the government is not embarrassed by these convictions during the past five years, perhaps it ought to disclose and explain the number of income tax prosecutions not only under § 3616(a) *since the 1939 code* by informations and indictments but the prosecutions under R.S. § 3179 *during the period 1913 to 1939*, although

[2] The government in its brief in the *Berra* case stated, at p. 24 n. 9, as follows:

> "We agree with petitioner, contrary to the court below (see Dillon v. United States, 218 F. 2d 97, 103), that Section 3616(a) applies to income tax violations. We think that its unqualified terms, the enactment of the predecessor of Section 3616(a) in 1864 as part of a Revenue Act which included an income tax (Act of June 30, 1864, c. 173, 13 Stat. 223, 225, 226, 281-285); and its collocation in the Internal Revenue Code of 1939, all point to its applicability to false income tax returns. This construction has been tacitly sustained in a number of cases. Ex parte Cohen, 191 F. 2d 309 (C.A. 9), certiorari denied, 342 U.S. 947; Taylor v. United States, 179 F. 2d 640, 643-644 (C.A. 9); Kirsch v. United States, 174 F. 2d 595, 597-598 (C.A. 8); Slick v. United States, 1 F. 2d 897 (C.A. 7); Ex parte Berkoff, 65 F. Supp. 976, 979-981 (D. Minn.); United States v. Koppelman, 81 F. Supp. 1007, 1008-1009 (M.D. Pa.); United States v. Benz, 24 Fed. Cas. No. 14,576 (N.D. Ill.) see also 10 Mertens, Law of Federal Income Taxation, Sec. 55.66."

the Court now states R.S. § 3179 had been impliedly repealed as to the income tax, and that § 3616(a) never did apply to income tax. Obviously Congress and the Internal Revenue were aware of these criminal prosecutions before the passage of § 3616(a) and § 7207. See *United States* v. *Leslie Salt Co.*, 350 U.S. 383 (1956).

2. The Court declares in the *Achilli* case that the evolution of §§ 145(a) and 145(b) "makes clear that by the time the unconfined language of § 3179 became § 3616(a) of the 1939 code, its scope had been shrunk by a series of specific enactments that had the potency of implied repeals." However, the Court does not state what still lies within the scope of § 3616(a). If the Court is correct as to § 3616(a)'s miniscule scope, Congress would not have written the section into the 1939 code under "Subtitle D, General Administrative Provisions; Chapter 34, Information and Returns; Subchapter B, Determination of Tax Liability" and, by its terms, made it applicable to ". . . *any* false or fraudulent list, *return*, account, or statement, with intent to defeat or evade the valuation, enumeration or assessment . . . ." If the Court's contention is correct, then the use of the words "list, count, statement, valuation and enumeration" are surplusage as applied to the two or three taxes to which the government explains this Act only applies, since none require the filing of lists, accounts or statements, or involve valuation and enumeration.[3]

[3] It simply can not be believed that Congress re-enacted a law in 1939, as suggested by the government in its brief in *Achilli* v. *United States* at page 28 to apply "to only three taxes, for which there appeared to be no evasion or false returns provisions in the acts themselves: (1) the excise tax on certain fish, animal and vegetable oils (26 U.S.C. 2490-2494); (2) the tax on the average amount of circulation issued by certain banks (26 U.S.C.

Since § 145(b) applies to any attempt to evade any tax imposed, then accepting the government's *ad hoc* contention there would be no necessity for the existence of § 3616(a), since filing a false return is an attempt. But Congress believed there was a need for having a statute that punished filing a false return, because it re-enacted § 3616(a) as § 7207 in the Internal Revenue Code of 1954.

In *United States* v. *Beacon Brass Co.*, 344 U.S. 43, the government argued that a single act or transaction may violate two or more statutes and that being dis-

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1900-1907); and (3) the excise tax on certain transfers of stock or securities to avoid income tax (26 U.S.C. 1250-1253, note particularly Sec. 1253(c)). The existence of these three areas of applicability, areas in which without Sec. n 3616 there would apparently have been no criminal sanction available within the internal revenue laws, indicates that Congress intended the section to be effective as a residual provision covering offenses for which no other sanction was provided." The government could not conceive of Congress enacting a criminal statute which covered no offense, hence this "theory" of Congress' intention. And unfortunately, "a theory survives long after its brains are knocked out." Frankfurter, J., dissenting in *Massachusetts Bonding and Ins. Co.* v. *United States*, 352 U.S. 128, 138 (1956). This theory to explain the existence of § 3616 is *completely demolished* by the actual statutes on the record. § 2493 provides that the fish oil tax should be collected in the same maaner as a duty imposed by the Tariff Act of 1930, and should be treated for the purposes of all provisions of law relating to the customs revenue as a duty imposed by this Act with certain exceptions, not here material. § 591 of the Tariff Act, 19 U.S.C. § 1591, provides penalties for its evasion similar to those provided for evasion of the income tax. There is, therefore, *specific* legislation dealing with evasion of the fish oil tax. 26 U.S.C. § 1904 states a specific penalty for a refusal or neglect to make a return or payment, besides additional penalties provided in other cases. 26 U.S.C. § 1250-1253, dealing with tax on transfers to avoid income tax, specifically states that all administrative provisions of the law relating to the assessment of taxes shall apply. And there has never been any criminal prosecutions under § 3616(a) or § 7207 for these three taxes.

tinct, each of the statutes is to be enforced as it was written. This argument fully applies in the instant case. Where doubt exists respecting the meaning of a statute the legislative history may be taken into consideration in resolving the doubt; but where the language used is clear, there is no need to refer to prior legislative history.

In *Ex Parte Collett*, 337 U.S. 55, 61, this Court stated:

> "The short answer is that there is no need to refer to the legislative history where the statutory language is clear. 'The plain words and meaning of a statute cannot be overcome by a legislative history which, through strained processes of deduction from events of wholly ambiguous significance, may furnish dubious bases for inference in every direction.' Gemsco, Inc. v. Walling, 324 US 244, 260, 89 L ed 921, 933, 65 S Ct 605 (1945). This canon of construction has received consistent adherence in our decisions."

The cases cited in the footnote show that the rule as to statutory revisions is the same. Clearly, the *Achilli* decision is in conflict with this Court's decisions dealing with interpretations of statutes. See Justice Jackson, "The Meaning of Statutes: What Congress Says or What the Court Says," 8 F.R.D. 121 (1949).

3. The well-settled rule that repeals by implication are not favored applies nowhere with greater force than in internal revenue laws. *Fabbri* v. *Murphy*, 95 U.S. 191, 196. It is a very common thing for cumulative remedies or penalties to be provided in laws concerning the revenue and its collection (*The Distilled Spirits*, 11 Wall. 356), and as stated by Mr. Justice Story as early as 1842 in *Wood* v. *United States*, 16 Pet. 341, 363—

> "The more natural, if not the necessary inference in all the cases is that the legislature intends the new laws to be auxiliary to, and in aid of the purposes of, the old law, even when some of the cases provided for may equally be within the reach of each. There certainly, under such circumstances, ought to be a manifest and total repugnancy in the provisions to lead to the conclusion that the later laws abrogated and were designed to abrogate the former."

And in *United States* v. *Barnes*, 222 U.S. 513, 520, this Court quoted with approval the above language of Mr. Justice Story. Clearly, there is no total repugnancy between § 145(b) and § 3616(a). Those statutes can be given operation without conflict. A person may *attempt* to evade taxes by filing a false return or he may merely file a false return. One offense involves an attempt to evade, the other does not.

In its brief in the *Novreck* case (pages 18 and 19), the government argued that Congress did not intend R.S. § 3179 to change the long-standing policy of treating perjury in a tax return as an offense additional to that of filing a false return, and that the acts modeled on R.S. § 3179 (including § 253 of the 1918 Revenue Act) did not carry that intent. Thus, the government said, a broad section which penalizes wilful attempts to evade taxation and which could embrace the filing of perjured returns, did not repeal the specific offense of perjury. However, the government did an about-face in *Achilli* and urged that the offense of attempting to wilfully evade income taxes which could embrace the filing of false returns impliedly repealed a specific penalty for filing of false returns. Even if the government, like a woman, is

entitled to change its mind, this Court should not yield so easily.

The broadening of the doctrine of implied repeal resulting from the *Achilli* opinion may well endanger other time-honored statutes, and even our national security. Only a few years ago the same argument was rejected by the Court, even though it meant the carrying out of a death sentence. *Rosenberg* v. *United States*, 346 U.S. 289. (1953). Justice Jackson concluded that the Atomic Energy Act of 1946 did not repeal the Espionage Act of 1917 because "it does not purport to repeal the earlier Act, nor afford any grounds for spelling out a repeal by implication. Each Act is complete in itself and has its own reason for existence and field of operation." *Id*, at 290. Justice Clark added, "nor can the partial overlap of two statutes work a *pro tanto* repealer of the earlier Act." *Id*, at 294. Justice Frankfurter dissented, not from this principle, but on the ground that the Court had insufficient time to examine the legislative history of these Acts to determine whether the later Act did repeal the earlier. *Id*, at 307.

Yet, the majority of this Court in *Achilli* adopted the government's argument which contradicted its own conduct, numerous court decisions, and in plain disregard of the literal words of a statute, simply on the basis of an inconsistency in penalties for different types of offenses.

Rochner on Federal Taxation, ¶ 157, p. 179 (June 14, 1957), commenting on the *Achilli* decision, stated:

> "It is interesting that Mr. Justice Frankfurter should be assigned the majority opinion, which by implied repeal of § 3616(a) placed the crime ex-

clusively under § 145(b), when we consider what he said in his Cardozo lecture, 'Some Reflections on the Reading of Statutes', 47 *Col. L. Rev.* at 545-6 (May, 1947):

> 'Above all, they [legislatures] must not be encouraged in irresponsible or undisciplined use of language. In the keeping of legislatures perhaps more than any other group is the well-being of their fellow-men. Their responsibility is discharged ultimately by words.'

4. The majority opinion concluded that R.S. § 3179 was repealed *pro tanto* as to the income tax by § II(f) of the Revenue Act of 1913, which prescribed a heavier penalty for the making of a false return with intent to evade the income tax than R.S. § 3179's penalty for making any false return. The majority was of the opinion that this conclusion is strengthened by the continued heavier penalties imposed by the 1916 and 1917 Acts. Having strained the doctrine of implied repeal by resting upon this slender reed, the Court suggested that Congress would not have inexplicably reversed itself in the 1918 Act by failing to mention in § 253 the making of false returns as a means of evasion proscribed by that section. It is obvious that this omission is an "inexplicable reversal" *only* if Congress intended in 1913 to repeal *pro tanto* R.S. § 3179. It is logical that Congress spoke economically in 1918 (when it neglected to enumerate the making of a false return as a means of evasion proscribed by § 253) because it considered R. S. § 3179 as applicable to income taxes, rather than because it considered the subject of making false returns as having been covered by the penalty for wilful attempts in any manner to evade the income tax. Furthermore, as

Justice Frankfurter has noted in another case, "Revenue laws are notoriously not expressions of an ordered system of reason and fairness." *Lewyt Corp. v. Commissioner*, 349 U.S. 237, 249 (1955) (dissent).

5. But assuming arguendo that the 1913 Revenue Act did repeal *pro tanto* R.S. §3179, which admittedly applied to income taxes between 1864 and 1913, the majority opinion in the *Achilli* case still neglected to explain the significance and purpose of the 1939 codification, which *reintroduced*, the language of R.S §3179 as §3616(a). The inclusion and position of §3616(a) in the Internal Revenue Code indicated that *Congress considered §3616(a) as an instrument for criminally enforcing the income tax*, and, therefore, overrides any implied repeal before 1939. 1 SUTHERLAND STATUTORY CONSTRUCTION, §§ 2035, 2036 (3d ed. 1943). In the same chapter as § 3616(a), § 3612(d) deals *civilly* with additions to the tax cases of failure to file or false returns.

If the Court *looks* at the latter statute, "considered to throw a cross light" upon the earlier enactment (*United States* v. *Aluminum Co. of Amer.*, 148 F. 2d 416, 429 (C.C.A. 2d 1945)), §7207 of the Internal Revenue Act of 1954, the successor of § 3616(a), as the Tables of the Internal Revenue Code and its legislative history clearly indicate, the theory that §3616(a) had atrophied and no longer applied to income taxes is met by the cold fact that Congress said it did apply in 1939 to income taxes, Congress said it did apply in 1954 to income taxes. The only change in the 1954 Act made by Congress was to eliminate the requirement of an "intent to defeat or evade", which removed the overlap with §7201 of the 1954 Code, formerly §145(b) of the 1939 Act.

This Court has given these Internal Revenue Acts a construction which now limits its application to precisely nothing until this Court recognizes that Congress did not have a futile purpose in their enactment.

For the foregoing additional reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1957.

No. 313

L. B. BINION,
Petitioner,
vs.
UNITED STATES OF AMERICA.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

PETITIONER'S SUPPLEMENTAL MEMORANDUM.

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IN THE

SUPREME COURT OF THE UNITED STATES.

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UNITED STATES OF AMERICA.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS.

PETITIONER'S SUPPLEMENTAL MEMORANDUM.

Since the filing of Petitioner's Reply Memorandum our attention has been called to the actual Senate and House Reports of the 1939 Internal Revenue Code, which are here included for the convenience of the Court.

It reveals that the Code was the result of an "intense research extending over ten years" for the purpose of correcting errors, eliminating "obsolete matter and temporary provisions". *Every* provision was carefully reviewed and

checked by the Treasury Department. The Department of Justice made suggestions and felt confident that the enactment of the codification would be a "definite step toward obtaining clarity, certainty and simplicity in our revenue laws."

Respectfully submitted.

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76th Congress / HOUSE OF REPRESENTATIVES / Report
1st Session / No. 6

CONSOLIDATE AND CODIFY THE INTERNAL REVENUE LAWS OF THE UNITED STATES

January 20, 1939.—Committed to the Committee of the Whole House on the state of the Union and ordered to be printed.

MR. DOUGHTON, from the Committee on Ways and Means, submitted the following.

REPORT

[To accompany H. R. 2762]

The Committee on Ways and Means, to whom was referred the bill (H. R. 2762) to consolidate and codify the internal revenue laws of the United States, having had the same under consideration, unanimously report it back to the House without amendment and recommend that the bill do pass.

THE NEED OF AN INTERNAL REVENUE CODE

The need for enactment into absolute law of a codification of internal-revenue laws has long been recognized. The last such enactment was in 1874, when the Revised Statutes were adopted. If the need for enactment into law of a codification was recognized in 1874, when only 17 volumes of the Statutes at Large had been published and our internal revenue was derived almost entirely from

taxes on liquor and tobacco, that need must be much greater today, when 34 additional volumes have been published and our internal revenue is derived from more than a hundred separate sources.

The United States Code is itself the culmination of more than 30 years' effort. Due to the mass of legislation contained in that code, it was thought best by the Congress to put it through a testing period before its enactment into law. It was, therefore, made only prima facie evidence of the law, and scrutiny of it was invited for the purpose of correcting errors, eliminating obsolete matter, and restatement.

The review and correction of the internal-revenue title was begun by the staff of the Joint Committee on Internal Revenue Taxation after the enactment of the Revenue Act of 1928. The first edition of the work was published in 1930, and the second, in 1933. The second edition was substituted for title 26 of the United States Code and became, therefore, prima facie evidence of the law.

It has now been nearly 13 years since the United States Code was enacted as prima facie law and more than 8 years since the first edition of the internal-revenue code was published by the staff of the joint committee. However, because the internal-revenue title is not the law, but only prima facie evidence thereof, it cannot be relied upon and it is still necessary to go to the many volumes of the Statutes at Large to determine what the law actually is. The great mass of internal-revenue legislation since 1873, scattered through 34 volumes of the Statutes at Large, makes such a recourse an exceedingly difficult undertaking, even for the most experienced lawyer. Statutes are repeated in subsequent acts in almost identical language, with no reference to prior acts or any expressed intention to amend or repeal. Provisions of a permanent character are included in riders and provisos and are hidden in various acts. Amendments are often involved and obscure. Inconsistencies and duplications abound.

The only practical way to determine with certainty that the internal-revenue code is actually the law is to enact it, as was done with the Revised Statutes in 1873. It is believed that it has had a sufficient testing period to make it acceptable as free from error.

In the preparation of this edition valued aid has been rendered by the Treasury Department. The work performed there has been under the immediate supervision and direction of Mr. Preston C. Alexander, chairman of the Chief Counsel's Committee, and Mr. Wallace Streater, of the Interpretative Division. The original work of comparing the text of the code with the basic law was divided among some 25 or 30 attorneys in the Chief Counsel's office, whose recommendations passed through the respective division heads or their assistants to Messrs. Alexander and Streater for the final review. Appreciation is expressed of the services of all who collaborated, whose number is too large to permit the mention here of each by name.

Grateful acknowledgment is also made of helpful suggestions received from the Department of Justice.

In this connection, Mr. James W. Morris, Assistant Attorney General, made the following comment as to the desirability of the enactment of this codification into law:

> I am glad to learn that the long-realized need of a codification which will be recognized as the law rather than as merely prima facie evidence thereof is probably soon to be filled. This need has been especially impressed upon the Tax Division of the Department of Justice inasmuch as the function of handling revenue litigation rests with it.
>
> It is evident that the confusion existing by reason of the number of revenue acts, containing in many instances the same basic provisions, to which reference must be made in the handling of cases arising under the various acts, constitutes a burden to the courts and counsel alike. Furthermore, several of these statutory provisions have been amended by Executive

order, but, since such changes have not appeared on the face of the statutes it has been necessary to refer to the Executive orders to ascertain their nature and extent. The proposed codification will be particularly helpful in that it eliminates these sources of confusion.

I am confident that the enactment of the codification will be a definite step toward obtaining clarity, certainty, and simplicity in our revenue laws and will be of substantial aid to this division in the handling of revenue litigation.

EXPLANATION OF THE CODE

This code contains all the law of a general and permanent character relating exclusively to internal revenue in force on January 2, 1939. In addition, it contains the internal-revenue law relating to temporary taxes, the occasion for which arises after the enactment of the code. The following should be noted in connection with the general character of the code:

First. It makes no changes in existing law.

Second. It makes liberal use of catchwords, headlines, different types, indentations, and other typographical improvements.

Third. By a system of cross references, it correlates not only its own provisions but also provisions of the United States Code not relating exclusively to internal revenue.

Fourth. To obviate confusion with the law itself, the cross-references are in type different from that containing the law.

Fifth. It is arranged with a view of giving prominence

to matters which concern the ordinary transactions of the ordinary classes of taxpayers.

The preparation of this code began with the collection and examination of all original statutes relating to internal revenue, without reference to the United States Code. This procedure allowed an independent check to be made subsequently against that code. The next step was the elimination of obsolete matter and those temporary provisions relating to taxes the occasion for which arose prior to the effective date of the code. The most striking examples of the temporary laws which are omitted are the income-tax provisions of the Revenue Act of 1936 and prior revenue acts. While these provisions remain in force for the purpose of administering the taxes for the earlier years, they do not affect the current tax situation.

After the elimination of the obsolete and temporary provisions from the whole body of internal-revenue law, the remaining provisions were checked against the United States Code. The care in the preparation of the United States Code and in the present codification gives assurance of the accuracy of the final product. Moreover, every provision has been carefully reviewed and checked by the Treasury Department and conferences have been held and agreements reached on all issues.

There are many laws of a general character which, though relating to internal revenue, apply also to other objects. To codify such laws under internal revenue, however, would disrupt the entire title structure of the United States Code and render complete codification of Federal law impossible. In only a few instances has any provision been taken from any title of the United States Code other than the internal-revenue title, and then only for the reason that such provision relates exclusively to internal revenue. The great value of the United States Code is thus preserved. Moreover, detailed cross-references compensate for any deficiency due to such a procedure by acquainting

the reader both with the general subject of the provision referred to and its location in the United States Code.

The final step was to arrange the code in a logical and convenient manner. There are six subtitles. Subtitle A contains those taxes over which the United States Board of Tax Appeals has jurisdiction. These include income, estate, and gift taxes.

Subtitle B contains the miscellaneous taxes.

Subtitle C contains the temporary taxes.

Subtitle D contains the general administrative provisions.

Subtitle E contains the personnel provisions.

Subtitle F contains provisions relating to the Joint Committee on Internal Revenue Taxation.

The purpose of this arrangement is to make the subtitles as far as possible complete in themselves. For example, those interested solely in provisions relating to income, estate, or gift taxes need concern themselves only with subtitles A and D, and may disregard the provisions relating to tobacco, liquor, and other miscellaneous taxes, which are included in subtitle B, as well as the provisions relating to temporary taxes, in subtitle C. In subtitle D, all general administrative provisions have been collected.

The chapter arrangement is based both upon the importance of the tax from a revenue standpoint and the number of persons affected. The plan for the arrangement of provisions in the income-tax chapter follows the Revenue Act of 1938 and consists of the collection of the provisions under two classifications, general provisions and supplemental provisions. The general provisions are those which apply to the ordinary transactions of the ordinary classes of taxpayers. In the main, the supplemental provisions are those which apply to the extraordinary classes of taxpayers or to the extraordinary transactions of the ordinary classes of taxpayers. Special administrative provisions are included in the supplemental provisions. This same scheme is applied to the chapters on the estate and gift taxes. The chapter on the United States Board of Tax Appeals is in-

cluded in subtitle A for the reason that the jurisdiction of the Board is confined to the taxes in that subtitle.

Subtitle B contains the miscellaneous taxes, such as the employment taxes arising under the Social Security Act and the Carriers Taxing Act of 1937, the taxes on tobacco and liquor, admissions and dues, issues and transfers of stocks, issues of bonds, etc. The arrangement of these chapters gives prominence to matters of chief interest to the taxpayer; that is, liability to tax, rate, payment, and other obligations and duties imposed upon the taxpayer. The special administrative provisions follow and the penalty and forfeiture provisions are grouped together so as to be readily located.

In subtitle C the temporary taxes are included. Among those are the manufacturers' excise taxes, the tax on telegraph and telephone messages, and the tax on electrical energy, which by express provision of the law expire on a specified date.

Subtitle D contains the administrative provisions of a general character. The arrangement of this subtitle follows the usual course of procedure in tax administration —that is, information, returns, assessment, collection, and refund.

Subtitle E contains the provisions relating to personnel. The provisions relating to appointment, salary, powers, and duties of internal-revenue officials and employees are logically and systematically arranged.

CALENDAR NO. 19

76th Congress, 1st Session | SENATE | Report No. 20

CONSOLIDATE AND CODIFY THE INTERNAL REVENUE LAWS OF THE UNITED STATES.

January 30, 1939—Ordered to be printed

MR. GEORGE, from the Committee on Finance, submitted the following

REPORT

[To accompany H. R. 2762]

The Committee on Finance, to whom was referred the bill (H. R. 2762) to consolidate and codify the internal-revenue laws of the United States, having had the same under consideration, unanimously report it back to the Senate without amendment and recommend that the bill do pass.

DESCRIPTION OF THE CODE

This code contains all the law of a general and permanent character relating exclusively to internal revenue in

force on January 2, 1939. In addition, it contains the internal revenue law relating to temporary taxes, the occasion for which arises after the enactment of the code. The following should be noted in connection with the general character of the code.

First. It makes no changes in existing law.

Second. The code will be the law and not merely prima facie evidence thereof. This will give a new starting point behind which it will not be necessary to search to determine the law as to current taxes. It will then be necessary only to look to subsequent legislation, which would be amendatory of the code itself.

Third. The code is prospective in its application. For example, in the case of the income tax, the code applies only to taxable years beginning after December 31, 1938. In the case of taxable years beginning prior to January 1, 1939, the income-tax provisions of the code will have no application, but the applicable provisions of the Revenue Act of 1938 and prior revenue acts will govern. In the case of the estate tax, the code will apply only to estates of decedents dying after the date of its enactment, the existing revenue acts continuing to apply to estates of decedents dying on or prior to such date. In the case of the gift tax, the code will apply only to the calendar year 1940 and subsequent calendar years, leaving such taxes for prior calendar years to be governed by the applicable provisions of the Gift Tax Act of 1932. In the case of the Social Security taxes, the code will apply to the calendar year 1939 and subsequent calendar years, leaving the prior years still under the Social Security Act.

As to the existing temporary taxes, the code applies only where the occasion for the tax arises after the effective date specified in the code. For instance, the code will

apply to automobiles sold on and after the first day of the calendar month occurring next after its enactment and automobiles sold prior to that date will be subject to the provisions of the Revenue Act of 1932. Also, the code will apply to sugar manufactured on or after the first day of that calendar month occurring next after the enactment of the code, but in the case of sugar manufactured prior to that date, the existing law will apply. The following table shows the effective date of the various chapters of the code:

Chapter	Subject	Application or effective date
1	Income tax	Taxable years beginning after Dec. 31, 1938.
2	Additional income taxes:	
	Personal holding companies	Do.
	Excess-profits tax	Income-tax taxable years ending after June 30, 1939.
	Excess profits on Navy contracts	Contracts completed within income-tax taxable years beginning after Dec. 31, 1938.
	Unjust enrichment	Taxable years ending during the calendar year 1939, and subsequent taxable years.
3	Estate tax	Estates of decedents dying after the date of the enactment of the Code.
4	Gift tax	Calendar years 1940 and subsequent calendar years:
5	Board of Tax Appeals	The day following the date of the enactment of the Code.
6	Capital-stock tax	Year ending June 30, 1939, and subsequent years.

Chapter	Subject	Application or effective date
7	Tax on transfers to avoid income tax	The day following the date of the enactment of the Code.
8	Alaskan railroads tax	Taxable years beginning after Dec. 31, 1938.
9	Employment taxes	Calendar year 1939 and subsequent calendar years.
10	Admissions and dues	First day of the first calendar month beginning after the enactment of the Code.
11	Documents, other instruments, and playing cards.	The day following the date of the enactment of the Code.
12	Safe-deposit boxes	First day of the first calendar month beginning after the enactment of the Code.
13	Circulation other than of national banks.	June 1, 1939.
14	Cotton futures	The day following the date of the enactment of the Code.
15	Tobacco, snuff, cigars, and cigarettes.	Do.

Chapter	Subject	Application or effective date
16	Oleomargine, adulterated butter, and process or renovated butter	Do.
17	Filled cheese	Do.
18	Mixed flour	Do.
21	Coconut and other vegetable oils	First day of the first calendar month beginning after the enactment of the code.
22	Fish, animal, and vegetable oils	Do.
23	Narcotics	Do.
24	White phosphorous matches	Do.
25	Firearms:	
	Pistols and revolvers	Do.
	Machine guns and short-barreled firearms.	The day after the date of the enactment of the code.
26	Liquor	Do.
27	Occupational taxes	Taxable years beginning on or after the day following the enactment of the code.
28	Provisions common to miscellaneous taxes.	The day following the date of the enactment of the code.
29	Manufacturers' excise and import taxes:	

Chapter	Subject	Application or effective date
	Excise taxes	The first day of the first calendar month beginning after the enactment of the code.
	Import taxes	The day following the date of the enactment of the code.
30	Transportation and communication	The first day of the first calendar month beginning after the enactment of the Code.
31	Documents and other instruments	The day following the date of the enactment of the Code.
32	Sugar:	
	Manufacture	The first day of the first calendar month beginning after the enactment of the Code.
	Importation	The day following the date of the enactment of the Code.
33	Coal	The first day of the first calendar month beginning after the enactment of the Code.

Chapter	Subject	Application or effective date
34	Information and returns	The day following the date of the enactment of the Code.
35	Assessment	Do.
36	Collection	Do.
37	Abatements, credits, and refunds	Do.
38	Miscellaneous provisions	Do.
39	The Office of the Commissioner of Internal Revenue.	Do.
40	The Office of the Assistant General Counsel for the Bureau of Internal Revenue.	Do.
41	Collectors of internal revenue	Do.
42	Deputy collectors of internal revenue	Do.
43	Internal-revenue agents	Do.
44	Storekeeper-gagers	Do.
45	Internal-revenue inspectors	Do.
46	Miscellaneous provisions	Do.

Fourth. The Code will not have any effect upon pending cases, suits, or controversies. All existing rights and liabilities are preserved.

Fifth. The Code repeals only such laws and parts of laws as are codified therein. It is believed that this Code, which is the result of intensive research extending over a period of 10 years, admits no reasonable doubt of its accuracy, but if it should develop that any provision has been improperly omitted, such provision is not repealed, but still remains the law. Likewise, temporary and obsolete provisions which are omitted from the Code are not repealed by it. Moreover, no provision of law corresponding to that contained in the Code is repealed until the corresponding Code provision becomes effective.

Sixth. If any error is found in the Code, it can be remedied by amendatory legislation. Conceding the possibility of error, it is the opinion of your committee that the interests of the Government and the taxpayer alike would be best served by the adoption of the Code as absolute law and the legislative correction of any errors that may be found in it. Such a procedure would be far less burdensome upon the parties concerned than the making of the code prima facie law, thereby subjecting it to rebuttal upon the production of the original statute. This last procedure would compel both the Government and the taxpayer to make a thorough search of the numerous Statutes at Large in every case to establish that the prima facie law was in fact the law, thereby resulting in perpetuating the confusion which increases with each new edition of the Statutes at Large.

Seventh. The Code makes liberal use of catchwords, headlines, different types, indentations, and other typographical improvements.

Eighth. To obviate confusion with the law itself, the

cross-references in the Code are in type different from that containing the law.

Ninth. The Code is arranged with a view of giving prominence to matters which concern the ordinary transactions of the ordinary classes of taxpayers.

The internal-revenue laws were first codified in the Revised Statutes of 1873, title XXXV, which was made absolute law. A perfected edition of the Revised Statutes was prepared in 1878, but is only prima facie, not absolute, law. In the years 1897 to 1907 a commission was engaged by Congress to codify the Federal laws, but the work was never completed. Subsequently, Hon. Edward C. Little prepared a codification of Federal laws which was embodied in a bill which passed the House of Representatives but failed of action in the Senate. The internal-revenue laws were again codified in title 26 of the United States Code, which was enacted as prima facie law in 1926. Scrutiny of the Code was invited in its preface for the purpose of correcting errors.

In 1930 the Joint Committee on Internal Revenue Taxation published a complete substitute for title 26 of the United States Code, containing all the law of a permanent character, relating exclusively to internal revenue, in force on December 1, 1930. This was not a mere duplication of the old title, for, in addition to correcting errors and eliminating obsolete matter, certain omitted provisions were added and the title completely rearranged in a manner considered logical and useful.

In 1933 a new edition was published containing the internal-revenue laws in force on July 16, 1932. This edition was substituted for title 26 of the United States Code, and in its present form is prima facie law. A third edition was published in 1938, containing the internal-revenue laws in force at the beginning of that year. The staff of the Joint Committee on Internal Revenue Taxation, with the co-

operation and assistance of the Treasury Department, has brought the internal-revenue code up to date by the present edition.

It has now been nearly 13 years since the United States Code was enacted as prima facie law and more than 8 years since the first edition of the internal-revenue code was published by the staff of the joint committee. However, because the internal-revenue title is not the law, but only prima facie evidence thereof, it cannot be relied upon and it is still necessary to go to the many volumes of the Statutes at Large to determine what the law actually is. The great mass of internal-revenue legislation since 1873, scattered through 34 volumes of the Statutes at Large, makes such a recourse an exceedingly difficult undertaking, even for the most experienced lawyer.

The only practical way to determine with certainty that the internal-revenue code is actually the law is to enact it, as was done with the Revised Statutes of 1873. It is believed that it has had a sufficient testing period to make it acceptable as free from error.

In the preparation of this edition valued aid has been rendered by the Treasury Department. The work performed there has been under the immediate supervision and direction of Mr. Preston C. Alexander, chairman of the Chief Counsel's Committee, and Mr. Wallace Streater, of the Interpretative Division. The original work of comparing the text of the code with the basic law was divided among some 25 or 30 attorneys in the Chief Counsel's office, whose recommendations passed through the respective division heads or their assistants to Messrs. Alexander and Streater for the final review. Appreciation is expressed of the services of all who collaborated, whose number is too large to permit the mention here of each by name.

Grateful acknowledgment is also made of helpful suggestion received from the Department of Justice.

In a letter to Hon. Pat Harrison, chairman of the Joint Committee on Internal Revenue Taxation, dated December

22, 1938, Mr. James W. Morris, assistant attorney general, stated:

Department of Justice,
Washington, December 22, 1938.

HON. PAT HARRISON,
Chairman, Joint Committee on Internal Revenue Taxation, Senate Office Building, Washington, D. C.

MY DEAR SENATOR HARRISON: In a recent conversation with Mr. Stam, chief of the staff of the joint committee, I was advised of the progress of the proposed codification of the revenue laws which has been undertaken by the committee.

I am glad to learn that the long realized need of a codification which will be recognized as the law rather than as merely prima facie evidence thereof is probably soon to be filled. This need has been especially impressed upon the Tax Division of the Department of Justice inasmuch as the function of handling revenue litigation rests with it.

It is evident that the confusion existing by reason of the number of revenue acts, containing in many instances the same basic provisions, to which reference must be made in the handling of cases arising under the various acts, constitutes a burden to the courts and counsel alike. Furthermore, several of these statutory provisions have been amended by Executive order, but, since such changes have not appeared on the face of the statutes it has been necessary to refer to the Executive orders to ascertain their nature and extent. The proposed codification will be particularly helpful in that it eliminates these sources of confusion.

I am confident that the enactment of the codification will be a definite step toward obtaining clarity, certainty, and simplicity in our revenue laws and will be of substantial aid to this Division in the handling of revenue litigation.

The staff of the joint committee deserves to be commended for its valuable contribution to the tax law.

Very truly yours,

JAMES W. MORRIS,

Assistant Attorney General.

In a letter from George M. Morris, Esquire, Chairman of the Standing Committee on Federal Taxation of the American Bar Association, dated January 24, 1939, Mr. Morris said:

> An examination of the codification of the Internal Revenue Laws as prepared by the staff of the Joint Committee on Internal Revenue, indicates that a highly sensible idea has been brought to a most satisfactory fruition.
>
> Unless one has had experience handling questions which involve the statutes treating with our internal revenue, for a span of years (not at all an unusual experience in tax disputes), he can have little idea of the difficulty of achieving certainty as to what the applicable statute law is. If for taxpayers and their counsel these difficulties and uncertainties can be eliminated, the reduction of expense of tax controversies, and even the elimination of such controversies, should be greatly furthered.
>
> Not only does it seem highly advisable that this painstakingly prepared codification should be enacted into law but it should be apparent that the sooner such action is taken the more beneficial will be the effect, particularly in the consideration of any revenue legislation during the present session of Congress. An intelligent consideration of any proposal for change would seem to require an assured knowledge of the law which it is proposed to change.

Office - Supreme Court, U. S.
FILED
AUG 21 1957
JOHN T. FEY, Clerk

No. 313

In the Supreme Court of the United States

OCTOBER TERM, 1957

L. B. BINION, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
CHARLES K. RICE,
Assistant Attorney General,
RICHARD B. BUHRMAN,
Attorney,
Department of Justice, Washington 25, D. C.

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OPINION BELOW

The *per curiam* opinion of the Court of Appeals (Pet. 15) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on June 28, 1957. (Pet. 16.) The petition for a writ of certiorari was filed on July 25, 1957. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254 (1).

QUESTION PRESENTED

Whether Section 3616 (a) of the Internal Revenue Code of 1939 applies to income tax returns.

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STATUTES INVOLVED

Internal Revenue Code of 1939:

> SEC. 145. PENALTIES.
>
> * * * * * *
>
> (b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.
>
> * * * * * *

(26 U. S. C. 1952 ed., Sec. 145 (b).)

STATEMENT

Petitioner was charged in two indictments, filed in the United States District Court for the Northern District of Texas on October 3, 1952 and June 8, 1953, with eight counts of wilfully attempting to evade the income taxes of himself and his wife by filing false returns for the years 1945 through 1948. (R. 6–8, 100–105.) On September 5, 1953, petitioner entered pleas of guilty in the United States District Court for the Western District of Texas (after his motion for change of venue had been granted) to four counts, those involving his returns and his wife's separate returns for 1947 and 1948. (R. 4–5, 91–93, 136–138.)

On December 14, 1953, he was sentenced to concurrent five-year prison sentences on three of the counts and fined $5,000 on each. On the remaining count, he was fined $5,000 and sentenced to a consecutive five-year prison term, execution of which was suspended on condition that the fines be paid within 90 days. (R. 93–94, 138–140.)

On September 22, 1956, petitioner moved for correction of his sentence in the District Court, relying upon *Berra* v. *United States*, 351 U. S. 131, for the proposition that he should have been sentenced under Section 3616 (a) of the Internal Revenue Code of 1939 rather than under Section 145 (b). This motion was denied on September 28, 1956. (R. 143–146.) The Court of Appeals affirmed that denial on the authority of *Achilli* v. *United States*, 353 U. S. 373. (Pet. 15.)

ARGUMENT

Petitioner urges that the sentence imposed upon him under Section 145 (b) of the Internal Revenue Code of 1939 was excessive; that he should have been sentenced under Section 3616 (a) of the Code which, contrary to the holding of this Court in *Achilli* v. *United States*, 353 U. S. 373, does apply to income tax returns; and that the Court should re-examine its decision in that case. There is nothing of any substance in the petition which was not thoroughly canvassed in the briefs and the petition for rehearing filed in the *Achilli* case, and in *Costello* v. *United States*, 353 U. S. 978.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.

CHARLES K. RICE,
Assistant Attorney General.

RICHARD B. BUHRMAN,
Attorney.

AUGUST 1957.